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## DISTRICT COURT JUDICIAL REVIEW IN MONTANA WORKMEN'S COMPENSATION CASES

### I. THE DILEMMA: INDUSTRIAL ACCIDENT BOARD'S FUNCTION VERSUS THE DISTRICT COURT'S FUNCTION

The general theory of any workmen's compensation scheme is one of providing through a social insurance system compensation for the injured worker without regard to fault.<sup>1</sup> One of the primary objectives of the Workmen's Compensation Law was to substitute a simple procedure for the slow and expensive litigation of the common law. It was thought that an administrative board would be comparatively cheap in operation, speedy of determination, more expertly manned by those with special expertise in a limited field of the law, and more flexible in the discharge of its function than the regular courts, so as to more definitely and concretely implement the policy of the Workmen's Compensation scheme.<sup>2</sup>

The Montana Supreme Court has stated that this simplified remedy for workmen's compensation involves the resolution of three issues: (1) Was there an accident?<sup>3</sup> (2) Did the accident arise out of and in the course of employment?<sup>4</sup> (3) Was the accident the cause of the injury?<sup>5</sup> There are thus a finite number of issues, indeed only a few, which must be resolved in every workmen's compensation case. In Montana, the resolution of these three issues is effected in what may occasionally require four steps.<sup>6</sup> (1) often a hearing and decision by a referee,<sup>7</sup> (2) a full

<sup>1</sup>H. SOMERS and A. SOMERS, *WORKMEN'S COMPENSATION* 28 (1954); TOELLE, *Progress of Workmen's Compensation in Montana During 1940*; 1941 MONT. L. REV. 52 (1941); The Supreme Court, in *Cudahy Packing Co. v. Parramore*, 44 Sup. Ct. 153 (1924) has stated: "Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract; that is upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital — the one for the sake of wages and the other for the sake of profits. The liability is based, not upon any act or omission by the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured."

<sup>2</sup>H. SOMERS and A. SOMERS, *WORKMEN'S COMPENSATION* 28 (1954); W. DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION* 17-26 (1936) (Hereinafter cited as DODD.).

<sup>3</sup>*Birnie v. United States Gypsum Co.*, 143 Mont. 39, 43. 328 P.2d 133, 135 (1958). These three elements are set forth in Revised Codes of Montana, § 92-418 (1947). (Hereinafter cited as R.C.M.). Other authors have thought there are five issues to be resolved in every workmen's compensation case; the foregoing three and (1) Is the claimant an employee or dependent? (2) Was the claim timely filed and prosecuted? F. COOPER, *STATE ADMINISTRATIVE LAW* 719 (1965). (Hereinafter cited as COOPER).

<sup>4</sup>*Birnie, Id.*

<sup>5</sup>*Id.* This procedure for disposition of industrial accident claims was established in 1915 and has remained essentially the same since then. See *infra*, note 77.

<sup>6</sup>See generally DODD, at 403. This four step procedure was set forth in a letter from the Chairman of the Montana Industrial Accident Board to the writer. The statutory basis for this procedure is found in R.C.M. §§ 92-812, 92-833, 92-834, 92-835, 92-836 (1947). The history of these statutes indicate they have not undergone substantial amendment since 1915. The chairman of the Industrial Accident Board in a letter to the writer also indicates this is the case. See *infra*, note 77.

<sup>7</sup>*Id.*

hearing before the Industrial Accident Board,<sup>8</sup> (3) an appeal to District Court,<sup>9</sup> (4) an appeal to the Montana Supreme Court.<sup>10</sup> The first two of these steps are commonly called administrative; the second two are commonly called judicial.<sup>11</sup> In simplified form, the problem of judicial review is to integrate the activities of these two branches of government in a manner that achieves results most compatible with the purposes of the workmen's compensation scheme, and yet to properly define and delineate their respective functions so the domain of power and responsibility of each is clear.<sup>12</sup>

## II. THE ANATOMY OF AN ADMINISTRATIVE ADJUDICATION

In theory there is a clear division of labor between the judiciary and the administrative functions. The administrative agency is the primary or sole fact finder.<sup>13</sup> On the other hand, the administrative and judiciary share the role of law pronouncing and law making. They are in partnership, but the court is the senior partner; it may supersede the administrative agency and itself determine the question of law.<sup>14</sup> Some assert the court must decide every question of law; others attribute to the administrative agency some power to decide questions of law.<sup>15</sup>

Essential to understanding this theoretical division of labor and judicial review of workmen's compensation cases is a comprehension of that elusive Gordian knot—administrative discretion. But this concept is in turn predicated upon the classical dichotomy between a question of law and a question of fact. Thus, a discussion of the differences between a question of law and a question of fact is in order.<sup>16</sup> It is perhaps more meaningful in distinguishing a question of law from a question of fact to speak in terms of distinguishing a finding of fact from a conclusion of law. This places the emphasis on the functioning of the decisional process.

A finding of fact has been defined as the assertion that a phenomenon has happened or is or will be happening independent of or anterior to

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>DODD, at 403.

<sup>12</sup>*Id.* at 403.

<sup>13</sup>L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546 (1965). (Hereinafter cited as JAFFEE).

<sup>14</sup>This idea has been given standard formulation by Justice Brandeis, concurring in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936): "The supremacy application of a conclusive presumption. . . of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied. . . . But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court."

<sup>15</sup>See Justice Roberts dissenting in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 135-136 (1944): "Clearly . . . Congress did not delegate to the [NLRB] . . . the function of defining the relationship of employment. . . . The question who is an employee . . . is a question of the meaning of the Act, and therefore, is a judicial and not an administrative question."

any assertion as to its legal effect.<sup>17</sup> It can be made by a person who is ignorant of the law. For example, a statute may provide compensation for injuries arising out of and during the course of employment. If it has been found that an employee while at work has been intentionally hit on the head by a fellow employee, this is a finding of fact—it is not dependent on the compensation statute. If, however, it is asserted that the injury arose out of the employment and is therefore compensable, the assertion is not a finding of fact, but a conclusion of law. A finding of fact can be defined, then, as a description of a phenomenon independent of lawmaking or law applying.

But, the finding stands for the fact; it is not the fact itself. The finding is made as the basis for the exercise of power. The question is not whether the fact exists in an absolute sense, but whether the evidence is sufficient to justify the exercise of power. Rules have evolved as to what is sufficient evidence to justify a finding of fact. Thus, a finding of fact may be ultimately conditioned by a rule of law. The process of reasoning from evidence to fact is based on reasoning, on the application of the finder's theory of experience. This law-making aspect of the fact-finding process is particularly pronounced in administrative fact finding. The fact finder here combines expertise in the field and a sense of responsibility for policy making. The experience of the agency generates rules for finding facts; the policy of the statute tends to generate presumptions for resolving questions in favor of the statutory purpose.

Conclusions of law include not only common law, statutory interpretation and constitutional law, but also questions of administrative jurisdiction, of fair administrative procedure, and of protection against arbitrary or capricious action or abuse of discretion.<sup>18</sup> Fundamentally, conclusions of law involve principles of common law, ethics and jurisprudence which courts are peculiarly suited to resolve.<sup>19</sup>

Finally, the context is established for a definition of the nucleus of administrative adjudication—administrative discretion.<sup>20</sup> Suppose three types of rules. First, a rule may provide that a fact is determinative. For example, if an employee deliberately violates a shop regulation, he is barred from receiving compensation.<sup>21</sup> Second, a rule may provide that a fact is relevant but not conclusive. Violation of a shop rule may again be an example. The rule might require the administrator to be guided by his sense of seriousness of the violation. If the administrator concludes in the case that the violation does not exclude liability, there will then

<sup>17</sup>JAFFEE at 548.

<sup>18</sup>4 DAVIS ADMINISTRATIVE LAW TREATISE § 29.01 (1958).

<sup>19</sup>JAFFEE at 553. When a court announces a rule of law that governs a case it is clear a conclusion of law is involved. Another example of a conclusion of law is the

<sup>20</sup>Professor Jaffee gives an excellent exposition of this nebulous concept. See generally, JAFFEE at 555, *et seq.*

<sup>21</sup>See *Le Blanc's case*, 332 Mass. 334, 125 N.E.2d 129 (1955), where apparent violation of a shop rule — operating an elevator in an out-of-bounds part of the plant — was conclusive against recovery.

arise the need for additional rules for dealing with the remaining facts until a conclusion is produced. The third type of rule requires that the shop violation be ignored. It is irrelevant to determination of the issue. This type of rule is distinguishable from the first type in that it does not necessarily decide the controversy. It differs from the second class of rule since it requires that the administrator exclude from his mind what might appear to be a relevant consideration. The second class of rule is perhaps the most characteristic instrument for making administrative decisions. It points out a factor as relevant, but provides no further rule for the application of the consideration. It thus requires the administrator to resort to a whole complex of additional concepts and attitudes, official and personal.

Decisions of law unless determined by a rule of the first type are always made in this way. The mind focuses attention for a period of time on a group of authoritative decisional factors. But ultimately it reaches a decision by an intuitive leap. This element is the discretion involved in an administrative decision. The third type of rule sets a limit to this process; it directs the administrator to put certain considerations out of his mind which he might otherwise consider. Thus, the first and third types preclude the exercise of discretion. The second type channels the exercise of discretion but cannot exclusively determine it. There may be many rules of the second type applicable to the making of a given decision, but there is no rule for combining all the factors into a decision. This combining process, thus, ultimately depends on the motivation of the judge or administrator who at this point must make a choice. The motivating elements may be officially established, i.e., policy, or unexpressed. The administrator must not deny the relevancy of any of the rules of law, but otherwise he may freely use all permissible elements, though an excessive emphasis on one to the exclusion of other elements may be an abuse of discretion.

It is clear then that any administrative agency lays down some rules of law; it establishes some presumptions to guide its exercise of discretion. It has been argued that all questions of law should be decided finally by the court.<sup>22</sup> For example, the Administrative Procedure Act provides that "The Court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of any agency action."<sup>23</sup> But this section excepts from review action "committed to agency discretion" and limits review to abuse of discretion.<sup>24</sup> Once a court has decided there is discretion, its exercise, if reasonable, is free of judicial control. The ar-

<sup>22</sup>This was the view of John Dickinson as expressed in the Judicial Review Provisions of the Federal Administrative Procedure Act (Section 10) Background and Effect, in *Federal Administrative Procedure Act and the Administrative Agencies* 546, 584 (Warren ed. 1947).

<sup>23</sup>60 Stat. 243 (1946), 5 U.S.C. § 1009(e).

<sup>24</sup>60 Stat. 243 (1946), 5 U.S.C. § 1009.

gument in favor of limiting agency law-making powers is that the statute does not provide for discretion—the agency is to simply function as a trial court. This is particularly true of an Industrial Accident Board passing on workmen's compensation claims where the analogy to a trial court is strong.

But, it seems a cogent argument that an order-making administrative agency such as the Accident Board should within the confines of its specialized jurisdiction have an element of discretion.<sup>25</sup> The domain of the area of administrative discretion should be governed by the statutory purpose; the "intention of the statute." Judicial review gives scope and substance to administrative exercise of discretion. It should mold the bounds of administrative discretion to suit not only the purpose of a single statute, but rather should establish that discretion should be exercised in a manner congruent with the theory and purpose of the entire statutory scheme of workmen's compensation.<sup>26</sup>

### III. PROCEDURE FOR REVIEW OF INDUSTRIAL ACCIDENT BOARD DECISIONS IN MONTANA

As a general principle of administrative law, the agency, because of its expertise, is vested with authority to find the facts with some degree of finality. The essence of an administrative decision is discretion. The reviewing court then reviews the record and determines all questions of law.<sup>27</sup> Viewed in this context, the statute providing for district court review of workmen's compensation cases in Montana is a rather strange creature. R.C.M. § 92-834 (1947) provides in part:

"The court may, upon the hearing, for good cause shown, permit additional evidence to be introduced, but, in the absence of such permission from the court, the cause shall be heard on the record of the board, as certified to the court by it. The trial of the matter shall be de novo, and upon such trial the court shall determine whether or not the board regularly pursued its authority, and whether or not the findings of the board ought to be sustained, and whether or not such findings are reasonable under all the circumstance of the case."<sup>28</sup>

The meaning of § 92-834 is ambiguous. It specifies additional evidence may be admitted at the district court level on review. It then states trial of the matter in the district court will be de novo. Normally trial de novo means "a new trial or retrial had in an appellate court in which the whole

<sup>25</sup>This seems especially true in view of the fact that the Industrial Accident Board has functions other than adjudication. It is responsible for the administration of the state insurance scheme. It is responsible for promotion of safe industrial practices, etc. It is responsible to some degree for rehabilitation.

<sup>26</sup>JAFFEE at 572.

<sup>27</sup>The extent to which the reviewing court reviews an agency's findings of fact will be considered, *infra*.

<sup>28</sup>R.C.M. § 92-834 (1947). It is interesting to note this section was reenacted by the legislature in 1965 without any substantive changes. Therefore under the reenactment doctrine one has a cogent argument that the legislature approves of the statute as it stands, and of all judicial constructions of that statute up to 1965.

case is gone into as if no trial whatever had been had in the court below."<sup>29</sup> The expectation would be a new determination of all issues of fact and law at the district court level by the district judge. Seemingly this is not the case, however. For the statute further states the district court shall decide whether to sustain the findings of the board. This sounds more like a review than a retrial. This ambiguity of § 92-834 has been noted by other commentators.<sup>30</sup>

There has of course been considerable construction by the Montana Supreme Court on the extent to which the statute provided for trial de novo versus review. The Court in *Dosen v. East Butte Copper Mining Co.* stated:

"The trial on appeal to the district court from an order or award made by the industrial accident board provided for by § 92-833, upon the certified record of the board, unless the court in the exercise of its discretion shall permit additional evidence to be introduced, is de novo only to the extent it permits additional evidence to be introduced; if the cause is heard on the record of the board the re-examination is in the nature of a review; but in either event the court must render its own judgment irrespective of what has gone before."<sup>31</sup>

The Court seemed to say that to the extent new evidence was introduced on the issues previously decided by the Board, a new determination was made by the Court.

This interpretation of § 92-834 raises the question of when new evidence is admissible in the district court. The Montana Supreme Court in *Sykes v. Republic Coal Co.* ruled on this in a manner quite consistent with *Dosen v. East Butte Copper Mining Co.*

The Court stated:

"The statute . . . in no case permits a full 'trial de novo' . . . , and in the absence of some statutory requirement as to the manner in which the discretion of the court shall be invoked, the informal

<sup>29</sup>BLACK'S LAW DICTIONARY 1677 (4th ed. 1951).

<sup>30</sup>DODD at 365 has noted:

"In Montana the statute provides for certifying the record of the hearing before the administrative tribunal to the district court which tries the case de novo on that record, unless, for good cause shown, the court allows the introduction of additional evidence within the court's discretion; if additional evidence is admitted, the district court's decision is to be based on the record plus the additional evidence. It is unusual to speak of trying the case de novo on the record made before the administrative body. What the statute intends is that the court arrive at its conclusion independently of the commission's findings. . . . But it is the duty of the district court to render its own judgment, and it is preferable to set aside the board's finding and make a finding of its own on the board's record when new evidence is introduced before the court."

TOELLE, *Progress of Workmen's Compensation in Montana During 1940, 1941* MONT. L. REV. 57 (1941) has noted:

"It would seem that the legislative intent was that the function of the district court is to review the record before the board on matters both of law and fact unless there is some special reason or good cause shown for the reception of additional evidence, in which case, partial trial de novo follows, but that in no case is full trial de novo by the district court contemplated."

*Dosen v. East Butte Copper Mining Co.*, 78 Mont. 579, 596; 254 P. 880, 884 (1927).<sup>6</sup>

presentation of persuasive reasons why additional testimony should be taken, made in the presence of opposing counsel who thus has an opportunity to be heard on the subject, is a sufficient showing of 'good cause.'<sup>32</sup>

The Montana Supreme Court seemed to depart from this position and move further towards complete retrial in *Paulich v. Republic Coal Co.*<sup>33</sup> The Board had denied a rehearing to the claimant, who alleged his period of compensation should be extended because he had not fully recovered from his injury within the period the Board thought he would recover. The Court stated:

"The provisions of this section indicate that the legislature had in mind the granting of very broad powers to the district court on appeal. Were it not for this section, the limitations of the statute would prevent determination of the matter finally, as was done by the lower court here, in the absence of a hearing before the Board. But this section seems to express rather plainly the will of the legislature that even where the Board fails to hold a hearing, on appeal, the district court may proceed and determine the matter at once."<sup>34</sup>

This ruling subjects the initial determination of a workmen's compensation claim to all the common law rules of evidence as well as any other technical rules of procedure which regulate proceedings before a District Court. This destroys many of the advantages which were supposed to flow from an administrative proceeding for workmen's compensation claims. It was provided by statute that the technical rules of the common law would not govern procedure before the Board.<sup>35</sup> The *Paulich* ruling went far indeed towards making a hearing before the Industrial Accident Board a sham contest before the real trial in District Court.<sup>36</sup>

This type of evasive proceeding is perhaps best demonstrated by *Murphy v. The Anaconda Co.*<sup>37</sup> Claimant sought compensation for the death of her husband. Apparently, the primary question was a medical issue of fact. The Board ruled against the claimant. On appeal to district court, new medical testimony was taken,<sup>38</sup> and the Court ruled for the claimant. The Supreme Court affirmed. It seems clear that this new medical testimony had a determinative effect. It should have been introduced before the Board. Unfortunately the opinion makes no comment

<sup>32</sup>*Sykes v. Republic Coal Co.*, 94 Mont. 239, 244; 22 P. 157, 159 (1933).

<sup>33</sup>*Paulich v. Republic Coal Co.*, 110 Mont. 174; 102 P.2d 4 (1940).

<sup>34</sup>*Id.* at 188, 102 P.2d at 10.

<sup>35</sup>R.C.M. § 92-812 (1947) states:

"Hearings and investigations—technical rules. All hearings and investigations before the board, or any member thereof, shall be governed by this act and by rules of practice and procedure to be adopted by the board, and in the conduct thereof neither the board nor any member thereof shall be bound by the technical rules of evidence. No informality in any proceedings or in the manner of taking testimony shall invalidate any order, decision, award, rule, or regulation made, approved, or confirmed by the board."

<sup>36</sup>TOELLE, *supra* note 30, at 58.

<sup>37</sup>*Murphy v. The Anaconda Co.*, 133 Mont. 198, 321 P.2d 1094 (1958).

<sup>38</sup>*Id.* at 200, 321 P.2d 1097.



on this issue.<sup>39</sup> However, such a procedure as allowed in *Murphy* fosters concealment and is an inducement to inefficient procedure. It is destructive of the authority of the Industrial Accident Board and erodes the theory underlying the workmen's compensation scheme by rendering it more litigious with more appeals.<sup>40</sup>

The court retreated from this position in a subsequent case, *Lind v. Lind*.<sup>41</sup> In *Lind*, the claimant injured his back while working for his father. The claimant sought recovery for partial permanent disability from his father's insurance carrier. The father continued to pay the claimant his full wage. The Board entered an order awarding only nominal compensation until the claimant proved a loss of wages by reason of his accident. After the Board denied a rehearing, the claimant appealed to District Court. The District Court heard additional testimony relating to claimant's disability and awarded partial permanent compensation. The Montana Supreme Court reversed the District Court and remanded to the Industrial Accident Board (in its first and only detailed pronouncement on the issue of the Board's relation to district court), stating:

"The question now presented is whether in view of the Board's order the district court had jurisdiction to take testimony on the subject of loss of earning capacity.

The question of jurisdiction of the district court necessitates a complete understanding of the relationship between the court and the Board. . . . This court is of the opinion, however, that the "additional evidence" provision of § 92-834 is not unlimited in scope. Were this not so, the hearing before the Board would be nothing more than an inquiry preliminary to a contest in the courts. This result is contrary to the purposes of the Act. An unreasonably broad interpretation of the "additional evidence" provision would defeat the basic reason for submitting the controversy to an administrative agency, which is to obtain a speedy determination of the claim by a non-technical procedure. . . .

In the present case, as a manifestation of this jurisdiction, the Board ordered that compensation be deferred until such time as claimant made a showing to the Board of his loss. It is important to note that denial of claimant's application for rehearing did not foreclose him from making this later showing. Claimant had other recourse than to appeal to the district court.<sup>42</sup> The Board expressed its willingness to award compensation when and if claimant demonstrated his loss of income.

<sup>39</sup>The opinion states only that new medical testimony was taken at the district court. The opinion is almost entirely concerned with whether heart failure while pushing a mail cart was the type of fortuitous event encompassed by the statute and whether pushing the cart caused heart failure.

<sup>40</sup>See generally, SOMERS, *Workmen's Compensation* 179 (1954); "Experienced administrators believe that among the greatest causes of excessive litigation are weak and unstable administrative policy and practice. The various types of administrative weakness and drift recited in this chapter all encourage contentiousness and appeal."

<sup>41</sup>*Lind v. Lind*, 142 Mont. 211, 383 P.2d 808 (1963). It appears that the *Murphy* decision caused considerable controversy which led to the amendment of R.C.M. § 92-418 in 1961 so as to considerably narrow the coverage of the workmen's compensation act. This may have led the Montana Supreme Court to be more critical of admitting new evidence at the district court.

<sup>42</sup>One wonders what other practicable avenue is open to the claimant after a rehearing is denied. R.C.M. § 92-833 (1947) specifies the procedure after decision on rehearing is appeal to the district court.

This court has heard a multitude of workmen's compensation cases in which the district court has properly permitted the introduction of additional testimony. . . . In each case the Board either refused to hear the petition (*Paulich v. Republic Coal Co.*) or made a final determination of the case thereby giving claimant no opportunity to make further proof before the Board. . . . The Board in this case has really made only an interlocutory order inasmuch as it permits claimant to present additional evidence before the Board. This court is agreed that no "final determination" has been made by the Board, consequently the district court was without jurisdiction to take additional testimony of loss of earning capacity."<sup>43</sup>

The Montana Supreme Court took a similar stand in *Obie v. Obie Signs*.<sup>44</sup>

It appears then that the Montana Supreme Court is tending toward a position limiting the admissibility of evidence in the District Court. If the court believes the Board has entered only an interlocutory order, it will require that any further evidence be presented first to the Board. The court interprets this order as an expression of intention by the Board not to relinquish jurisdiction of the case. The court respects this intention of the Board and in so doing adds to the strength of the Board.<sup>45</sup>

One could, of course, assert that the *Lind* and *Obie* rationales represent an application of one of the timing doctrines of administrative law, e.g. exhaustion of administrative remedies, finality, ripeness for review. But, the *Lind* rationale seems distinguishable from these doctrines. They concern the issue of whether the ruling of the administrative agency is sufficiently final to give a court jurisdiction to review the case. The *Lind* rationale nowhere spoke of jurisdiction to review the case; rather *Lind* spoke of jurisdiction to receive new evidence. Therefore, the *Lind* rule is a rule excluding evidence when the Industrial Accident Board has expressed an intention to keep the case open to further modification.

The Court in a more recent case has seemed to qualify the above standard in a pragmatic effort to do substantial justice. In *Benoit v. Murphy Corporation*,<sup>46</sup> claimant suffered an affliction of the lungs from the inhalation of gas. The Board ordered the claimant be awarded nominal compensation until the claimant proved a loss of wages due to the affliction. The Board further entered an order retaining jurisdiction of the case. The defendant's insurance company, alleging the affliction was only temporary, appealed to district court. The district court allowed the introduction of new testimony, namely the testimony of the original examining doctor. The district court upheld the Board's finding of per-

<sup>43</sup>*Lind v. Lind*, 142 Mont. 211, 216, 383 P.2d 808, 812 (1963).

<sup>44</sup>*Obie v. Obie Signs*, 143 Mont. 1, 6, 386 P.2d 68, 71 (1963).

<sup>45</sup>See *supra*, note 40. Strengthening the Industrial Accident Board may have some tendency to further the purpose of the workmen's compensation act.

<sup>46</sup>*Benoit v. Murphy Corporation*, 143 Mont. 463, 391 P.2d 350 (1964).

manent partial impairment and in addition awarded the claimant compensation for the injury in contrast to the Board's award of nominal compensation. The insurance company appealed to the Supreme Court, citing *Lind* and alleging the district court was without jurisdiction to receive into evidence the testimony of the doctor and upon this evidence to predicate the overturning of the Board's order allowing only nominal compensation. The insurance company urged the proper procedure was to return the matter to the Board for a hearing on the newly introduced testimony in accordance with the doctrine of *Lind v. Lind*, *supra*.

"Counsel argue that there was no evidence before the Board as to the extent, if any, that Benoit's ability to earn wages in the open labor market had been harmed and that the claimant made no effort to introduce any evidence thereof. With that we can agree, but then to contend before this court that the testimony presented in the district court by the dissatisfied employer and its insurance carrier, which did supply this evidence, was inadmissible and therefore there exists no basis for the court's award, is startling to say the least. Benoit was not before the district court by virtue of any request he made; he was brought here and in no way objected to coming and raised no objection to the presentation of further testimony.

The *Lind* case in our opinion is sound and nothing said herein limits or qualifies that decision in any way; but it is clearly not applicable to the situation here presented to us. There is no question of jurisdiction presented here. The court had jurisdiction of the cause and the parties; it acted only on the evidence presented to it by appellants insofar as fixing the compensation award; in all other matters it affirmed the actions of the Board."<sup>47</sup> (writer's emphasis).

In substance the case seems to depart from the *Lind* rule, but the departure is probably justified by special circumstances.<sup>48</sup>

The *Benoit* decision represents the newest step in the construction of § 92-834 and the interrelated issues of when new evidence may be presented in district court, and to what extent the proceeding in district court is a trial de novo. It seems reasonable to conclude that *Benoit* does not overthrow the *Lind* and *Obie* rationales, that the Supreme Court is tending to restrict the introduction of new evidence in district court at the review stage and to strengthen the discretion an administrative body such as the Industrial Accident Board is normally accorded.

Fundamentally the proceeding in district court is not what is normally viewed as a trial de novo. The issues are established at the hearing before the Industrial Accident Board. New evidence may be introduced at the district court level. But the basic structure of the case is established before the Board; the proceeding is one of review of the record. This raises the classical problem of judicial review of administrative decisions; what are the standards by which the court reviews

<sup>47</sup>*Id.* at 467, 391 P.2d 350, 352 (1964).

<sup>48</sup>See generally, 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 30.03 *et. seq.* (1958). This may be viewed as a classical instance perhaps of Professor Davis' practical approach to judicial review of administrative decisions.

an administrative decision when review is based on the previously established record.

#### IV. STANDARDS FOR JUDICIAL REVIEW OF INDUSTRIAL ACCIDENT BOARD DECISIONS IN MONTANA

The district court will review all issues which may be categorized as conclusions of law. The difficult problem is defining the standard by which findings of fact are reviewed. It seems the prevailing standard of judicial review of administrative agencies is the substantial evidence rule.<sup>49</sup> The contemporary version of the "substantial evidence" rule as applied in the state courts is predicated upon a statement made by the United States Supreme Court in an NLRB case.<sup>50</sup> The court stated that under this rule the reviewing court is authorized to set aside administrative findings of fact when—and only when—the court is left with the conviction that "the record . . . clearly precludes" the agency's "decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." The substantial evidence test requires the court to uphold the findings of the administrative agency if they are reasonable; if they are supported by "substantial" evidence. The test is reasonableness, not rightness.<sup>51</sup>

It seems to be clearly established that Montana presently requires that the District Court in reviewing on-the-record findings of the Industrial Accident Board can reverse such findings only if there is a clear preponderance of the evidence against the Board's findings.<sup>52</sup> At times Montana has appeared to waver from the preponderance rule or appear confused. This is exemplified by *Stordahl v. Rush Implement Co.*<sup>53</sup> The Supreme Court stated:

<sup>49</sup>Davis states:

"The dominant tendency in both state courts and federal courts is toward the middle position known as the substantial-evidence rule. Under this rule the court decides questions of law but it limits itself to the test of reasonableness in reviewing findings of fact. . . . The debate of the 1930's over scope of review was largely between those who wanted broad review or even de novo review and those who wanted narrow review or even no review; the extremists, however, moved from both ends towards the middle and the substantial-evidence rule prevailed."

4 DAVIS, TREATISE ON ADMINISTRATIVE LAW § 29.01 (1958).

Larson states:

"Judicial review of awards is usually confined to questions of law. Except in a minority of jurisdictions the evidence supporting fact findings is not weighed on review, such findings being conclusive if supported by any substantial evidence." 2 LARSON, WORKMEN'S COMPENSATION LAW § 80.10 (1961).

<sup>50</sup>Universal Camera Corp. v. NLRB, 340 U.S. 474, 490, 95 L.Ed. 456, 71 Sup. Ct. 456 (1951).

<sup>51</sup>4 DAVIS, ADMINISTRATIVE LAW TREATISE § 29.05 (1958).

<sup>52</sup>The Montana Supreme Court has not considered the language of § 92-834 and § 92-835 to be mandatory, but rather only directory. This seems exemplified by the *Lind* case, *supra*, note 43, where the statute provides evidence may be admitted and yet the Supreme Court reversed because of the admission of new evidence. See generally, COOPER at 733-34.

<sup>53</sup>*Stordahl v. Rush Implement Co.*, 148 Mont. 13, 417 P.2d 95 (1966).

"The district court on appeal from the board is not justified in reversing a finding of the board unless the evidence clearly preponderates against such finding."<sup>54</sup>

Subsequently in the opinion the court stated:

"The Board's finding of a lack of causal relationship between the fracture and the tumor that caused death was based on substantial affirmative evidence devoid of conjecture and speculation. The fracture and tumor were coincidental which was strongly fortified by competent expert testimony."<sup>55</sup> (emphasis added)

In this latter portion of the opinion there is language leading to the substantial evidence rule and language leading to the speculation and conjecture rule.<sup>56</sup> The case of *Jones v. Bair's Cafe* seems to have firmly established the preponderance rule, though.<sup>57</sup>

"In each of the cases involving the presumption of correctness of the board's findings, this Court has applied the rule that 'The district court on appeal from the board is not justified in reversing a finding of the board unless the evidence clearly preponderates against such finding.' *Stordahl v. Rush Implement Co.*, *supra*." (emphasis court's)<sup>58</sup>

The precise difference between the preponderance and the substantial rule is difficult to articulate. Both are standards one commonly finds applied in jury proceedings. The preponderance rule requires a degree more of evidence in opposition to the Board's finding than the substantial rule, in order for the district court to overturn the Board's finding. This would have the effect of giving added weight to the findings of the Board. This would be consistent with the alleged trend of the court's rulings in giving the Board a slightly broader scope of authority or a slightly broader scope of discretion, more consistent with administrative law in general. A subsidiary standard to the general standard of review that is worthy of some note is the manner in which medical testimony is reviewed by the district court.

Before proceeding to a consideration of this standard, however, it is perhaps analytically prudent to refine the definition of a finding of fact. Findings of fact can be split into two categories. These two categories are (1) findings of basic fact (phenomena existing independent of the law, *supra*)<sup>59</sup> and (2) inferences, or findings of ultimate facts.<sup>60</sup> Findings of basic fact may be regarded as evidentiary facts; the concept is largely self-explanatory. Normally, this would be the area where exercise of administrative discretion would be least subject to review.

<sup>54</sup>*Id.* at 20, 417 P.2d 95, 99 (1966).

<sup>55</sup>*Id.* at 20, 417 P.2d 95, 99 (1966).

<sup>56</sup>See generally, 2 LARSON WORKMAN'S COMPENSATION LAW, §§ 80.10, 80.30 (1961).

<sup>57</sup>*Jones v. Bair's Cafe*, .... Mont. ...., 445 P.2d 923 (1968).

<sup>58</sup>*Id.* at 925.

<sup>59</sup>COOPER at 708.

<sup>60</sup>*Id.*

But, it appears the extent of review of administrative findings of basic fact varies widely from state to state and from agency to agency.<sup>61</sup>

The concept of ultimate fact is more difficult to delineate. Professor Davis states the heart of fact finding is the business of drawing inferences.<sup>62</sup> Essentially an ultimate fact is a fact inferred from evidentiary on basic fact.<sup>63</sup> Ultimate facts may alternatively be described generally as factual conclusions derived from basic facts. They are often expressed in terms of statutory criteria such as "public interest," "convenience and necessity," or "arising in the course of employment" or "good faith" or "misconduct." They represent inferences drawn by the agency; and it is commonly said that the reasonableness of the inference is a question appropriate for judicial determination, i.e., a "question of law."<sup>64</sup>

Cooper states that when the finding is an inference of ultimate fact, the scope of review is broadened.<sup>65</sup> If the basic facts are undisputed and the court is of the opinion that from those basic facts only one inference of ultimate fact could reasonably be drawn, the court will reverse for error of law an administrative decision which has derived a contrary inference as to the ultimate facts. Putting the thought another way, where the undisputed basic facts give rise to only one reasonable inference, a question of law is presented and the agency's order will be reversed if it erred in the determination of that question.<sup>66</sup> This refined analytical structure should render clearer the ensuing discussion of the standard applied to review of medical testimony.

Two things should be noted about medical testimony. First, it involves a basic or evidentiary finding of fact. That is, medical testimony establishes the basic fact, e.g. of the fourth vertebrae being permanently displaced. Second, the Board is continuously faced with the establishment of an injury by means of medical testimony; indeed, it seems they might soon become amateur physicians.<sup>67</sup> Therefore the Board would seemingly build up a substantial degree of expertise in the evaluation of medical testimony. Both these factors tend to lend weight to the finality of the findings of the Board in this area.<sup>68</sup>

<sup>61</sup>COOPER at 733.

<sup>62</sup>4 DAVIS, ADMINISTRATIVE LAW TREATISE § 29.05 (1958).

<sup>63</sup>COOPER at 708.

<sup>64</sup>*Id.* at 708.

<sup>65</sup>*Id.* at 708.

<sup>66</sup>*Id.* at 708.

<sup>67</sup>KESSLER, REHABILITATION OF THE PHYSICALLY HANDICAPPED 50 (1953).

"Expert medical opinion is dragged on the scene to add a macabre touch. . . . Talmudic scholars, the medieval philosophers, the dialecticians of Greece never carried on abstruse discussions such as take place in compensation hearings. The relation between injury and disease and the fine mathematical evaluations of disabilities are pure speculation that has no relation to every-day working conditions."

<sup>68</sup>Generally, these remarks set the tone for review of findings based on medical testimony in other states. COOPER at 754 states:

"Workmen's compensation commissions have been reversed both for placing too heavy reliance on physician's reports, and also for disregarding them. It has been held to be error for a commission to base findings of causation on medical testi-

Unfortunately there does arise some problem with medical testimony. Doctors, being trained intellectuals, are hesitant to state things in absolute terms. This has occasionally led to the overruling of a Board decision because the record showed a statement by a doctor that the injury could have *possibly* been caused by factors other than the accident.<sup>69</sup>

The Montana Supreme Court has not been entangled in this thicket of over-cautious interpretation of medical testimony, however, and tends to extend a goodly degree of finality to the Board's findings when the finding involves the evaluation of medical testimony. This is clearly demonstrated by *Stordahl v. Rush Implement Co., supra*.<sup>70</sup> There the cutter bar of a grain windrower fell on the claimant's back and his back was injured. A short while after, he developed cancer about six inches above the spot where his spine had been injured by the grain windrower. A doctor read from a book the following statement requiring as a condition for the causation of cancer:

"The identity of the injured area with that giving origin to the tumor; a blow in one part of the body cannot be made the cause of a tumor arising in another part."<sup>71</sup>

The Board found the cancer was not caused by the grain windrower injury. There was conflicting testimony; the District Court reversed the Board. The Supreme Court ruled in favor of the Board:

"We have diligently examined the record in this cause and conclude that the Board, in the exercise of its long established prerogative to determine credibility and conflicts of proof was amply warranted in resolving the issue as it did.

The Board's finding of a lack of causal relationship between the fracture and the tumor that caused death was based on sub-

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mony which went no further than to suggest that the injury might have caused the later-appearing disability, or on unverified written reports of physicians, or on testimony of a physician who relied on a statement of symptoms by a claimant who knew he was being examined only for the purpose of enabling the doctor to give testimony. On the other hand, it has been held to be error for a commission to disregard competent, relevant, and substantial medical testimony. But the agency's evaluation of conflicting medical testimony is usually deemed conclusive on the court."

<sup>69</sup>2 LARSON WORKMEN'S COMPENSATION LAW § 80.32 (1961) states:

"The distinction between probability and possibility should not follow too slavishly the witnesses' choice of words, as sometimes happens in respect to medical testimony. A doctor's use of such words as "might," "could," "likely," "possible," and "may have," coupled with other credible evidence of a non-medical character, such as a sequence of symptoms or events corroborating the opinion, is sufficient to sustain an award. It is a common experience of compensation and personal injury lawyers to find that the more distinguished a medical witness is, the more tentative and qualified are his statements on the witness stand. He will testify that the sledge-hammer blow on claimant's head might have caused claimant's headache, but hesitates to say positively that this was the only possible cause, and may concede on cross-examination that there could conceivably be other causes. The weight of such testimony, however, should not be too sharply discounted because of the disposition of the highly trained scientific mind to refrain from unqualified statements or opinions on such matters as causation."

<sup>70</sup>*Supra*, see note 53.

<sup>71</sup>*Id.* at 19, 417 P.2d 98.

stantial affirmative evidence devoid of conjecture and speculation. The fracture and tumor were coincidental which was strongly fortified by competent expert testimony."<sup>72</sup>

The Supreme Court has taken a similar stand in other cases.<sup>73</sup>

An interesting and important qualification to this rule of finality is seen in *Jones v. Bair's Cafe*.<sup>74</sup> A woman working in a restaurant injured her back while lifting a tub of dirty dishes to be washed. There was a question of law involved—whether the statute which had been amended in 1967 to cover unusual strains could be construed to cover the activity of the woman lifting the tub. There was also a question of basic fact—whether the lifting caused the back injury. There was conflicting medical testimony on the latter issue. The Board had denied compensation; the district court allowed compensation. The Supreme Court affirmed the district court. Almost the entire opinion was concerned with the question of law involved. The Supreme Court noted with respect to the conflict in the medical testimony and the Board's finding that the injury had not as a finding of fact resulted from the lifting of the tub:

"In passing we acknowledge the employer's position that Doctor Whitehair testified that the claimant had an abnormality of the spine in that she had four lumbar vertebrae rather than five and that she had minimal osteoarthritis of the spine. However, the doctor testified that the subsequent back condition resulted from an unusual strain.

All of the medical testimony, that of Doctor Whitehair and Doctor Kelley, as well as reports in the Industrial Accident Board file of other doctors, add to the conclusion that the evidence clearly preponderated against the findings of the Industrial Accident Board. The finding of the district court that an injury or unusual strain resulted from an industrial accident is correct."<sup>75</sup>

Apparently the Supreme Court will not hesitate to overrule a finding of the Board based on medical testimony when the Board had clearly ruled erroneously on a question of law involved.<sup>76</sup>

## V. CONCLUSIONS AND PROPOSALS

The statutory system establishing the review procedure from the Board to district court is antiquated<sup>77</sup> and ambiguous. It fails to establish whether there is a review procedure or a de novo procedure. To the extent the procedure is de novo it deserves repeal. Authorities have gen-

<sup>72</sup>*Id.* at 22, 417 P.2d 101.

<sup>73</sup>*Simons v. C. G. Bennett Lumber Co.*, 146 Mont. 140, 148, 404 P.2d 505, 510 (1965). The Supreme Court stated:

'To reach this finding, necessarily the district judge had to reject or disbelieve Dr. Dunlap who gave his opinion that the accident was causally connected to aggravation of the degenerative disk. No other medical testimony to rebutt this was offered. We hold, under the circumstances here, the finding of the Industrial Accident Board that a back sprain which has resulted in permanent partial disability, must be affirmed and that the district court was in error in making new findings in the face of Dr. Dunlap's uncontradicted opinion.'

<sup>74</sup>*Jones v. Bair's Cafe*, .... Mont. ...., 445 P.2d 923 (1968).

<sup>75</sup>*Id.* at 445 P.2d 926.

<sup>76</sup>*Id.* at 445 P.2d 926.



erally criticized de novo review.<sup>78</sup> Thus, the statutory scheme should be altered in order to provide that all evidence must be presented initially before the Industrial Accident Board.

The general standard of review in Montana—that the Board's findings can be reversed only if the clear preponderance of the evidence is against such findings—is subject to the same criticisms as the substantial evidence rule. First, it smacks of the standard applied to jury findings and thus calls forth all the judicial rules applied to jury findings. An administrative body such as the Industrial Accident Board is not a jury, but a body of individuals with a goodly degree of expertise in the area and vested with a goodly degree of discretion. Professor Jaffee has commented on the substantial evidence rule:

"This formula [the substantial evidence rule] would appear to have been derived from the test for sustaining a jury verdict. But there is some ground to believe that in recent years the intended meaning of that test has become subtly blurred, and that the blurring has spread to administrative law. One feels at times that the notion of "reasonableness" is torn from context; the question is felt to be not whether a reasonable man would consider the evidence of record sufficient under the LAW to support the verdict, but whether the verdict is reasonable as measured by a yardstick outside the law. The blurring is perhaps carried further by still one more subtle shift. Reasonableness may be felt to characterize the juror as a man rather than as a reasoner. These transpositions shift attention from the adequacy of the process of REASONING on the evidence in terms of the legal standard to the character of the verdict as the social judgment of a decent layman. The resulting criterion is a vague sense of justice rather than justice as expressed in the applicable rules of law."<sup>79</sup>

We should not attempt to transplant doctrines from review of jury findings to evaluate Board findings.

The second criticism flows from the first; the preponderance rule like the substantial evidence rule focuses too much on the cumulative

<sup>78</sup>The history underlying enactment of the Workmen's Compensation Act perhaps explains its peculiar review procedures. The basic statutory scheme was enacted in 1915. There has been no change in the review procedures since that time. In fact, § 92-834 was reenacted in 1965 without any change. Originally it seems the industrial employer interests in the state were afraid the Industrial Accident Board would favor the injured employee in the granting of claims. Therefore, they succeeded in having the law written so as to give the district court substantial control over the Board including trial de novo, where the district court thought such procedure warranted. The employer fears appear to have been unfounded, however. It now appears the Board is more conservative in granting claims than the district courts.

<sup>79</sup>Dodd at 405 states:

"The courts are not organized for the administration of compensation laws, and there has usually been failure when administrative powers have been vested in them. Protection against abuses does not require trials de novo or the taking of additional testimony by the courts."

Professor Davis, § 29.07, states:

"When an administrative record has been made, taking testimony from the same witnesses a second time is wasteful, and even when statutes explicitly provide for de novo review, courts strive to prevent a duplication of the evidence-taking process."

TOELLE, *Progress of Workmen's Compensation in Montana During 1940, 1941* MONT. L. REV. 38, 58 (1941); 2 LARSON WORKMEN'S COMPENSATION LAW § 80.00 (1961); Letter from Chairman Swanburg to the writer.

<sup>80</sup>JAFFEE at 596

aspect of the evidence present in the record and does not focus sufficiently on the inferential process by which the Board arrives at a finding. The Board through exercise of its discretion should build up substantial expertise in the inferential process, e.g., evaluating medical evidence. The classical formulation of the substantial evidence rule is apt in its application to findings of basic fact, but it does not lend itself to meaningful application to findings of ultimate facts which represent inferences derived from basic facts.<sup>80</sup> A more sophisticated standard is required to review the rulings of an agency possessed of expertise and vested with discretion in its area of expertise.

Therefore it is believed the approach of the Revised Model State Administrative Procedure Act is desirable.<sup>81</sup> First, the Act provides that all evidence must be initially presented to the Industrial Accident Board. A party may in a review proceeding before the district court upon a showing satisfactory to the court have new evidence presented to the Board. But, in no case is evidence initially presented to the district court. Second, the Act provides the district court shall review Board rulings according to the "clearly erroneous" rule. The clearly erroneous rule would focus attention on the inferential process underlying the Board's ruling as opposed to the cumulative aspect felt to be present in the "substantial evidence" rule.

These standards, it is believed, would clearly delineate the judicial and administrative functions. The Industrial Accident Board would become, in fact, an administrative agency and not a preliminary fact-finder or jury.<sup>82</sup> The expertise and discretion of the Board would come into maximum use and efficiency in administering the Workmen's Compensation scheme. Yet, the scope of review would be adequate to correct erroneous decisions or abuses of discretion. And, the Model Act would provide a needed uniformity and predictability to review in workmen's compensation cases not presently available. It is asserted that the standards set forth in the Revised Model Act represent the direction in which judicial opinion and rationale is presently moving in Montana. Therefore, adoption of the revised Model Act is urged.<sup>83</sup>

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<sup>80</sup>COOPER at 728 states:

"Attempts to apply the 'substantial evidence' rule to cases where the only question is whether an agency's inference of ultimate facts is without reasonable foundation, and hence clearly erroneous, produces difficulties both for the courts and for the lawyers who must assay prognoses as to the probable outcome of an appeal."

<sup>81</sup>REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15.

<sup>82</sup>See generally, *supra*, notes 49 and 45.

<sup>83</sup>COOPER at 729 states:

"Convinced of the inadequacies of the 'substantial evidence' test, the draftsmen of the Revised Model State Act provided that the reviewing court may reverse or modify the agency decision if it is 'clearly erroneous' in view of the reliable, probative, and substantial evidence on the whole record.

This standard does not permit the court to weigh the evidence, or to substitute its judgment for that of the agency on discretionary matters. But it does authorize the court to examine the whole record, and to reject as mere chaff testimony which is plainly unreliable or without probative force and then to determine whether on the remaining evidence it must be concluded that the agency plainly erred."

